TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 19

HAROLD FAHY, PETITIONER,

vs.

CONNECTICUT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1962
CERTIORARI GRANTED FEBRUARY 25, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 449

HAROLD FAHY, PETITIONER,

vs.

CONNECTICUT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 19, 1963

[fol. 1]

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY STATE OF CONNECTICUT

No. 14,277

STATE,

v.

HAROLD FAHY.

INFORMATION—February 10, 1960

Lorin W. Willis, State's Attorney for Fairfield County accuses Harold Fahy then of Norwalk of the crime of Wilful injury to public property and charges that on the 1st day of February 1960 at Norwalk, in said county, the said Harold Fahy did wilfully injure a public building, in said Norwalk, to wit: the Temple Beth Israel by smearing the same with black paint in offensive and objectionable forms, against the peace and contrary to the form of the statute in such case made and provided.

Dated at Bridgeport, Conn. this 10th day of February, 1960.

Lorin W. Willis, State's Attorney in and for Fairfield County.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

DEMURRER—Filed May 24, 1960—and Overruled—May 24, 1960

The defendant demurs generally and specially to the information filed against him and moves the same be quashed and dismissed for the following reasons:

The act charged by the information:

> "The wilful injury to a public building in said Norwalk to wit: The Temple Beth Israel, by smearing the same with black paint in offensive and objectionable forms against the peace and contrary to the statute in such case made and provided"

does not constitute an injury to a public building as provided in this statute and, therefore, does not constitute a violation of the same.

Defendant,
By Cummings & Lockwood, His Attorneys.

Demurrer overruled.

Bogdanski, J.

May 24, 1960.

[fol. 2]

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

PLEA—June 15, 1960

On June 15, 1960 the accused entered a plea of Not Guilty and elected to be tried by the Court.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

MOTION IN ARREST OF JUDGMENT—Filed June 30, 1960

The defendant moves in arrest of judgment in this case on the grounds that the offense charged in the information, to wit:

> "The wilful injury to a public building in said Norwalk to wit: The Temple Beth Israel, by smearing the same with black paint in offensive and objectionable

forms against the peace and contrary to the statute in such case made and provided"

does not constitute an injury to a public building as provided in this statute and, therefore, does not constitute a violation of the same.

Defendant,
By Cummings & Lockwood, His Attorneys.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

ORDER DENYING MOTION IN ARREST OF JUDGMENT—
June 30, 1960

The above motion is denied.

Bogdanski, J.

[fol. 3]
IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY, BRIDGEPORT

STATE OF CONNECTICUT

Present, Hon. Joseph W. Bogdanski, Judge.

No. 14,277

STATE,

vs.

HAROLD FAHY.

JUDGMENT

Upon the information of Lorin W. Willis Attorney for the State, within and for said County of Fairfield, charging said Harold Fahy now in the custody of the Sheriff of said County, with the crime of Wilful Injury to Public Property

—sec. 53-45 as amended by Public Act #437 as per information on file.

The prisoner appeared then for plea said "Not Guilty" to said charge and elected to be tried by the court, and after a full hearing a decision of "Guilty" to said charge was rendered.

It is therefore considered by the Court that the prisoner is Guilty of said crime in manner and form as charged in said information.

The Court thereupon sentenced the said prisoner to be confined for the term of sixty (60) days in the County Jail at Bridgeport in said County, and to stand committed until said judgment is complied with.

Date of Sentence June 30, 1960.

By the Court,
Roy H. Ervin, Asst. Clerk.

[fol. 4]

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

DEFENDANT'S APPEAL—Filed September 1, 1960

In the above entitled action, the defendant, Harold Fahy, appeals to the Supreme Court of Errors from the judgment rendered therein.

Defendant,
By Cummings & Lockwood, His Attorneys.

Clerk's Certificate to foregoing appeal (omitted in printing).

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

No. 14,278

STATE,

v.

WILLIAM ARNOLD.

INFORMATION—February 10, 1960

Lorin W. Willis, State's Attorney for Fairfield County accuses William Arnold then of Norwalk of the crime of Wilful injury to public property and charges that on the 1st day of February 1960 at Norwalk, in said county, the said William Arnold did wilfully injure a public building, in said Norwalk, to wit: the Temple Beth Israel by smearing the same with black paint in offensive and objectionable forms, against the peace and contrary to the form of the statute in such case made and provided.

Dated at Bridgeport, Conn. this 10th day of February, 1960.

Lorin W. Willis, State's Attorney in and for Fairfield County.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

DEMURRER—Filed May 24, 1960—and Overruled—May 24, 1960

The defendant demurs generally and specially to the information filed against him and moves the same be quashed and dismissed for the following reasons:

[fol. 5] The act charged by the information:

> "The wilful injury to a public building in said Norwalk to wit: The Temple Beth Israel, by smearing the same with black paint in offensive and objectionable forms against the peace and contrary to the statute in such case made and provided"

does not constitute an injury to a public building as provided in this statute and, therefore, does not constitute a violation of the same.

Defendant,
By Hirschberg, Pettengill & Strong, His Attorneys.

Demurrer overruled.

Bogdanski, J.

May 24, 1960.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

PLEA—June 15, 1960

On June 15, 1960 the accused entered a plea of Not Guilty and elected to be tried by the Court.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

MOTION IN ARREST OF JUDGMENT—Filed June 30, 1960

The defendant moves in arrest of judgment in this case on the grounds that the offense charged in the information, to wit:

> "The wilful injury to a public building in said Norwalk to wit: The Temple Beth Israel, by smearing the same with black paint in offensive and objectionable forms against the peace and contrary to the statute in such case made and provided"

does not constitute an injury to a public building as pro-
[fol. 6] vided in this statute and, therefore, does not constitute violation of the same.

Defendant,
By. Hirschberg, Pettengill & Strong, His Attorneys.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

ORDER DENYING MOTION IN ARREST OF JUDGMENT—
June 30, 1960

The above motion is denied.

Bogdanski, J.

Dated: June 30, 1960.

Roy H. Ervin, Ass't Clerk.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY, BRIDGEPORT

STATE OF CONNECTICUT

Present, Hon. Joseph W. Bogdanski, Judge.

No. 14,278

STATE,

VS.

WILLIAM ARNOLD.

JUDGMENT

Upon the information of Lorin W. Willis Attorney for the State, within and for said County of Fairfield, charging said William Arnold now in the custody of the Sheriff of said County, with the crime of Wilful Injury to Public Property

—sec. 53-45 as amended by public act #437 as per information on file.

The prisoner appeared then for plea said "Not Guilty" to said charge and elected to be tried by the court and after [fol. 7] a full hearing a decision of "Guilty" was rendered to said charge by the court.

It is therefore considered by the Court that the prisoner is Guilty of said crime in manner and form as charged in said information.

The Court thereupon sentenced the said prisoner, to be confined for the term of sixty (60) days in the County Jail at Bridgeport in said County, and to stand committed until said judgment is complied with.

Date of Sentence June 30, 1960.

By the Court,
Roy H. Ervin, Asst. Clerk.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

DEFENDANT'S APPEAL—Filed September 2, 1960

In the above entitled action, the defendant, William Arnold, appeals to the Supreme Court of Errors from the judgment rendered therein.

Defendant,
By Hirschberg, Pettengill & Strong, His Attorneys.

* * * * * * *

Clerk's Certificate to foregoing appeal (omitted in printing).

[fol. 8]

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

No. 14278

September 27, 1960

STATE OF CONNECTICUT,

vs.

WILLIAM ARNOLD.

STIPULATION CONSOLIDATING CASES FOR APPEAL—
Filed September 29, 1960

It is hereby stipulated that this case may be consolidated with State of Connecticut vs. Harold Fahy, No. 14277, for the purposes of appeal to the end that only one request for a finding and draft finding and one assignment of errors need be filed on behalf of both defendants and only one record need be printed.

Plaintiff,
By Lorin W. Willis, State's Attorney for Fairfield County.

Hirschberg, Pettengill & Strong, Counsel for William Arnold.

ORDER APPROVING—October 17, 1960

The foregoing stipulation is approved and the cases ordered consolidated for purposes of appeal.

Bogdanski, Judge.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

No. 14,277

STATE,

v.

HAROLD FAHY.

No. 14,278

STATE,

v.

WILLIAM ARNOLD.

REQUEST FOR FINDING—Filed October 1, 1960

Appellants in the above-entitled case respectfully request a finding of facts for an appeal to the Supreme Court of Errors and submit the draft finding hereto annexed.

The questions of law which they desire to have reviewed are:

1. Did the Court err in concluding that the defendants by their conduct, upon all of the evidence, had wilfully [fol. 9] injured a public building within the meaning of Sec. 53-45 of the General Statutes of Connecticut (1958 Revision) as amended by Public Act 437 (1959 Session)?

2. Did the Court err in precluding the defendants from establishing that the police officers searched the premises of the defendant Fahy without a warrant in violation of the Fifth Amendment to the Constitution of the United States and Article I, Section 8 of the Constitution of the State of Connecticut?

3. Did the Court err in permitting Detective Frank Tigano to give his opinion of the material used to paint

the building in question without first requiring him to be qualified as an expert?

4. Did the Court err in overruling the demurrers of the defendants?

5. Did the Court err in denying defendants' motions for acquittal at the end of the State's case?

6. Did the Court err in denying defendants' motion for acquittal at the end of the entire case?

* * * * * * *

Defendant, Harold Fahy, By Cummings & Lockwood.

Defendant, William Arnold, By Hirschberg, Pettengill & Strong.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

FINDING—Filed October 25, 1960

First

The following facts are found:

[fol. 10] 1. On the first day of February, 1960, a Jewish house of worship known as Synagogue Beth Israel was located on Concord Street in the City of Norwalk.

2. Between the hours of 4:00 and 5:00 a.m. on that morning, swastikas had been painted with black paint on the top step leading to the entrance to the synagogue, one on the side of the step and one on the casing between two basement windows.

3. About 4:40 a.m., Officer Lindwall, a Norwalk police officer, saw an automobile without headlights operating on a public highway in Norwalk about a block away from the synagogue.

4. Although the police officer signalled this car to a stop, he was obliged to pursue it about one mile before the car was halted.

5. The officer found the two defendants in the car and the defendant Fahy was driving.

6. The officer questioned the defendants about their reason for being out at that hour and was told that they had been out for coffee at a diner and were headed back toward their home.

7. The defendant Fahy had no license to operate a motor vehicle and the officer insisted that the defendant Arnold drive the car from that point to their home.

8. In searching the car in which the defendants were riding, the officer found a can of black paint and a two-inch paint brush.

9. The officer followed the defendants while they drove home.

10. Neither of the defendants appeared at any time to be intoxicated or under the influence of liquor.

11. Later on the same morning, Officer Lindwall learned of the painting of the swastikas upon the synagogue and reported that he had seen the defendants in that vicinity.

[fol. 11] 12. Police officers then went to the home where the defendants were living and placed them under arrest.

13. The police found the same can of black paint and the brush in the car which the defendants had been operating when stopped by Officer Lindwall earlier in the morning.

14. The two-inch paint brush matched the markings made with black paint upon the synagogue.

15. Both defendants admitted that they were the ones who had painted the swastikas on the synagogue and they admitted that the paint and the brush found in the car had been used by them for that purpose.

Second

The court reached the following conclusions:

16. Both defendants were guilty as charged.

Third

The following rulings were made on the trial:

17. Officer Lindwall testified that he went to the Fahy home on Wilson Point in South Norwalk before obtaining a warrant for the arrest of either defendant and before he had obtained a search warrant to search the premises, and entered the garage of the Fahy home which is situated under the house. He then removed the paint and paint brush allegedly used to apply paint to the Temple. Defendants' counsel was precluded by the Court upon the State's objection from pursuing his examination of Officer Lindwall in an effort to establish the unlawful search and seizure of the paint and paint brush.

18. Detective Frank Tigano was permitted, over objection, to give his opinion concerning the material used to paint the Temple without any foundation being laid for such questioning and without qualifying Detective Tigano as an expert.

[fol. 12] 19. Detective Frank Tigano did testify that the swastikas had been marked upon the synagogue with a type of black paint. Subsequently, both defendants admitted that they had used the black paint found in their car for that purpose.

Fourth

The appellants made the following claims of law respecting the judgment to be rendered upon which the court ruled as hereinafter stated:

20. The information fails to charge an offense.

21. The competent, credible evidence offered by the State failed to establish the guilt of the defendants of the crime charged beyond a reasonable doubt.

The court overruled same.

Bogdanski, J.

IN THE SUPERIOR COURT FOR FAIRFIELD COUNTY

STATE OF CONNECTICUT

ASSIGNMENT OF ERRORS—Filed November 12, 1960

A.

Errors apparent on the face of the record:

The Court erred:

1. In overruling the demurrer to each of the informations.

2. In denying the motion in arrest of judgment filed by each defendant.

B.

Errors in the conduct of the trial:

The Court erred:

[fol. 13] 1. In finding that: "The defendant Fahy had no license to operate a motor vehicle * * *," being a part of paragraph 7 of said finding, without evidence.

2. In reaching the conclusion set forth in paragraph 16 of the finding when the facts set forth in the finding do not support a finding that the defendants are guilty as charged in the informations.

3. In overruling the claims of law stated in paragraphs 20 and 21 of the finding.

4. In making the ruling set forth in paragraphs 17, 18 and 19 of the finding.

C.

The Court erred in concluding upon all of the evidence that the defendants were guilty of the crime charged in the information beyond a reasonable doubt.

Defendant, Harold Fahy, By Cummings & Lockwood, His Attorneys.

Defendant, William Arnold, By Hirschberg, Pettengill & Strong, His Attorneys.

Corrections refused—

Nov. 14, 1960.

Bogdanski, J.

[fol. 14] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 15]

[Stamps—Date of Supreme Court Judgment June 26, 1962—Decision Announced July 10, 1962]

IN SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

April Term, 1962

STATE OF CONNECTICUT,

v.

HAROLD FAHY.

STATE OF CONNECTICUT,

v.

WILLIAM ARNOLD.

OPINION

Informations charging the defendants with the crime of wilful injury to public property, brought to the Superior Court in Fairfield County and tried to the court, Bogdanski, J.; judgment of guilty in both cases and appeal by the defendants. *No error.*

Francis J. McNamara, Jr., for the appellant (defendant in the first case).

John J. Sullivan, for the appellant (defendant in the second case).

John F. McGowan, assistant state's attorney, with whom, on the brief, was Otto J. Saur, state's attorney, for the appellee (state).

BALDWIN, C. J. The defendants were tried on separate informations charging wilful injury to public property under General Statutes § 53-45, as amended by No. 437, § 1, of the 1959 Public Acts. The factual and legal issues in the cases are identical, and the cases were tried together to the court without a jury. The court found the defendants guilty as charged and sentenced each of them to sixty days in jail. They have appealed.

The trial court found the following facts: On February 1, 1960, between the hours of 4 and 5 a.m., swastikas were painted with black paint on the steps and on the casing between two basement windows of the Temple Beth Israel, on Concord Street in Norwalk. About 4:40 a.m., Osborn Lindwall, a Norwalk police officer, saw an automobile, without its headlights on, being operated on a public highway about a block away from this synagogue. He signaled the car to stop but was obliged to pursue it in his police car for about a mile before it was halted. The defendant Fahy was driving the car, and the defendant Arnold was a passenger. Lindwall questioned them about their reason for being out at that hour, and they told him that they had been to a diner for coffee and were going home. Fahy had no license to operate a motor vehicle, and the officer insisted that Arnold drive. The officer checked the car and found a jar of black paint and a two-inch paint brush under the front seat. He followed the car to Fahy's home. Later the same morning, he learned of the painting of the swastikas on the synagogue and reported that he had seen the defendants in that vicinity. Police officers then went to Fahy's home and placed both defendants under arrest. They found the jar of black paint and the brush in the car in which the defendants had been riding when they were stopped earlier in the morning. The two-inch paint brush matched the markings made with black paint on the synagogue. The defendants admitted that they had painted the swastikas on the synagogue and that the paint found in the car had been used for that purpose.

The defendants claim; first, that the informations do not charge an offense under General Statutes § 53-45, as amended by Public Acts 1959, No. 437.[1] They concede that the synagogue is a public building but contend that the painting of the swastikas on it does not constitute a wilful injury within the intent of the statute. Their argument is predicated on the legislative history of this act. As originally enacted in 1832, the pertinent portion provided that, "if any person shall wilfully and maliciously injure or deface any house of public worship, school-house, or other public building," he should be subject to penalties. Public Acts 1832, c. 9, § 2; Statutes, 1838, p. 182, § 2. This wording [fol. 16] continued without material alteration until the Revision of 1875, when the words "or deface" were omitted, among other changes. General Statutes, Rev. 1875, p. 500, § 3. Since 1875, the wording of the phrase with which we are concerned has remained unchanged. The defendants claim that by the omission of the words "or deface" the legislature intended to treat the word "deface" as distinct from the word "injure." They argue that although the painting of swastikas on a building may be a defacement, it is not an injury to the building. A contrary holding is to be found in *Vaughn* v. *May*, 217 Mo. App. 613, 625, 274 S.W. 969.

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[1] Prior to the action of the 1959 legislature, the statute read: "Sec. 53-45. INJURY TO PUBLIC BUILDINGS, FURNITURE OR VOTING BOOTHS. Any person who wilfully injures any public building or wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

The 1959 public act, effective June 11, 1959, was as follows: "No. 437. AN ACT CONCERNING INJURY TO PUBLIC BUILDINGS. Section 1. Section 53-45 of the general statutes is repealed and the following is substituted in lieu thereof: (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both. (b) Any person who wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

In seeking to ascertain the intent of legislation, "[i]t is presumed that changes in the language of a statute made when it is incorporated into a revision are not intended to alter its meaning and effect, and this is particularly true of the Revision of 1875." *Castagnola* v. *Fatool*, 136 Conn. 462, 468, 72 A.2d 479, and cases cited. It is therefore to be assumed that the revisers in 1875 considered that the word "injure" conveyed the meaning of "injure or deface." The words have been judicially interpreted as synonymous. *Saffell* v. *State*, 113 Ark. 97, 99, 167 S.W. 483. The 1959 public act (No. 437) by its terms purported to repeal § 53-45 of the 1958 Revision but at the same time again adopted the language of the 1875 Revision which is material to us. Whether a new provision is in the form of a new enactment repealing the old, as in this case, or the form of an amendment of the old is immaterial and depends on the preference of the draftsman. *Simborski* v. *Wheeler*, 121 Conn. 195, 200, 183 A. 688. The 1959 public act was, in effect, merely an amendment to § 53-45 of the General Statutes. See Prefatory Statement, Public Acts 1959. An amendatory act is presumed not to change the existing law further than is expressly declared or necessarily implied. *Norwalk* v. *Daniele*, 143 Conn. 85, 89, 119 A.2d 732. Nothing in the 1959 act either expressly declares or necessarily implies a change in the meaning of the language under scrutiny. The informations therefore charged an offense under § 53-45 as amended by No. 437, § 1, of the 1959 Public Acts.

The defendants assign error in the alleged refusal of the trial court to allow them to pursue their cross-examination of Officer Lindwall in an effort to establish the unlawful search and seizure of a paint jar and paint brush from Fahy's car when it was in a garage under the house where Fahy resided. After the date of the judgments, June 30, 1960, and while these appeals were pending, the Supreme Court of the United States announced its decision in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. This decision abrogated our prior law that relevant evidence, though obtained by unreasonable search and seizure in violation of the federal constitution, was admissible in evidence in our state courts. *State* v. *DelVecchio*, 149 Conn. (23 Conn. L.J., No. 31, p. 9); see *State* v. *Carol*, 120 Conn.

573, 575, 181 A. 714; *Pickett* v. *Marcucci's Liquors*, 112 Conn. 169, 173, 151 A. 526; *State* v. *Reynolds*, 101 Conn. 224, 233, 125 A. 636; *State* v. *Magnano*, 97 Conn. 543, 117 A. 550; *State* v. *Griswold*, 67 Conn. 290, 305, 34 A. 1046. The rule of *Mapp* v. *Ohio*, supra, applies to a pending appeal. *State* v. *DelVecchio*, supra.

The finding concerning the ruling on evidence assigned as error, as corrected by the trial court subsequent to the decision in *Mapp* v. *Ohio*, supra, and before argument before us, discloses the following: Lindwall testified that he went to the Fahy residence before obtaining a search warrant to search the premises and that he entered the garage and removed the paint jar and the paint brush from the car. The defendants sought to examine Lindwall in order to establish that the paint and the brush were unlawfully seized, in violation of their rights under the fourth and fourteenth amendments to the federal constitution and article first, § 8, of the constitution of this state. The court precluded the defendants from pursuing this examination, on objection by the state that any illegal seizure of the paint jar and the brush did not prevent their admission in evidence in a state court. In argument before us on April 3, 1962, the question was raised by the state whether the corrected finding was sufficient for us fully to consider the error claimed. After the argument, the defendants moved that a certified transcript of the evidence taken at the trial be made a part of the record on appeal. The state acquiesced in the motion. Since the evidential ruling involved a matter as to which there had been a change in the law after the case was tried, the appeal taken and the original finding made, we granted the motion. *State* v. *Kreske*, 130 Conn. 558, 562, 36 A.2d 389.

An examination of the transcript discloses the following: The state, in its case in chief, produced William Tarsi of the Norwalk police department. He testified that on February 1, 1960, at about 6:55 a.m., he observed swastikas painted in black paint on the synagogue, and that they had not been there when he observed the building at 4 a.m. that morning. The state then called Officer Lindwall, who testified to the facts already recited as having been found by the court, as follows: At about 4:40 a.m., he saw the Fahy

car being operated, without lights on, about a block from [fol. 17] the synagogue. He pursued the car until it stopped, and he questioned the defendants, who were riding in it. He observed a jar of paint and a brush in the car but did not take them into his custody. He allowed the defendants to proceed to Fahy's home and followed them until their car turned into the driveway.

The transcript further discloses the following evidence: When Lindwall learned, about 7:30 a.m., that swastikas had been painted on the synagogue, he went to Fahy's house, entered the garage and took the jar of paint and the brush from the car. On cross-examination, Lindwall testified that he entered the garage, that he removed the jar of paint and the brush from the car in the garage, and that he had no search warrant. Thereupon, he was asked whether he had applied for a search warrant, and the state objected. The court sustained the objection and refused to allow any further inquiry, on the ground, in effect, that the lack of a search warrant was immaterial.

Although the defendants objected to the admission of the paint jar and the brush when they were first offered, the objection was not at that time based on an illegal search and seizure, and the court was not asked to rule on their admissibility in the light of any such claim. See *Casalo* v. *Claro*, 147 Conn. 625, 629, 165 A.2d 153; *State* v. *DeGennaro*, 147 Conn. 296, 304, 160 A.2d 480. The reason for the requirement that there be timely objection and exception and also an adequate statement of the claims on which the objection is based, in compliance with the rules of procedure (Practice Book § 155), are well stated in a concurring opinion by Judge Van Voorhis in *People* v. *Friola*, 11 N.Y.2d 157, 160, 182 N.E.2d 100, a case which also involved the application of the *Mapp* decision, supra: "Courts are continually reconsidering old precedents and, if no objection or equivalent was required here, objection would never be necessary to raise a question of law where it is urged that some former decisional law be changed. That would not accord with the purposes of the rule requiring an objection, which is to apprise the court and the adversary of the position being taken when the ruling is made. It is important to know at the time that rulings are being challenged so that

additional evidence or argument may be presented and the point considered by the trial court with knowledge that the rule is being contested."

The specific ruling of which the defendants complain is the refusal of the court to allow them to cross-examine Officer Lindwall to show that the search and the seizure were illegal. The transcript reveals that much of the necessary evidence was already in the case and, further, that the defendants had ample opportunity to, and in fact did, elicit testimony from Lindwall on cross-examination adequate to lay a foundation for their claim. While the defendants failed to make proper objection to the admission of the evidence, they attempted later in the trial to raise the issue of the constitutionality of the search and the seizure, and we will consider it. See *People* v. *O'Neill*, 11 N.Y.2d 148, 152, 182 N.E.2d 95.

Security of one's privacy against arbitrary intrusion by the police is guaranteed by the federal constitution as well as by the constitution of this state. U.S. Const. Amend. IV, XIV, § 1; Conn. Const. Art. I § 8; *Wolf* v. *Colorado*, 338 U.S. 25, 27, 69 S. Ct. 1359, 93 L. Ed. 1782. This protection extends to the premises where an unreasonable search is made. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374. Probable cause for a belief that certain articles subject to seizure are in a dwelling cannot in and of itself justify a search without a warrant. *Jones* v. *United States*, 357 U.S. 493, 497, 78 S. Ct. 1253, 2 L. Ed. 2d 1514; *Agnello* v. *United States*, 269 U.S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145. There are no exceptional circumstances in this case which would warrant the search and seizure here—circumstances such as the necessity for immediate seizure lest the criminals flee, or the articles be transported out of reach, before a lawful warrant could issue. See *United States* v. *Jeffers*, 342 U.S. 48, 52, 72 S. Ct. 93, 96 L. Ed. 59; *Johnson* v. *United States*, 333 U.S. 10, 15, 68 S. Ct. 367, 92 L. Ed. 436; *Carroll* v. *United States*, 267 U.S. 132, 151, 45 S. Ct. 280, 69 L. Ed. 543. The search took place about two hours before the arrest and cannot be justified as incidental to it. *Rios* v. *United States*, 364 U.S. 253, 261, 80 S. Ct. 1431, 4 L. Ed. 2d 1688; *United States* v. *Di Re*, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210; *State* v.

DelVecchio, 149 Conn. (23 Conn. L.J., No. 31, p. 9). The facts show that the officers had ample opportunity for procuring a search warrant without employing the method of illegal entry. See *Johnson* v. *United States*, supra. We conclude, therefore, that the search and the seizure by Lindwall at 7:30 a.m. were unlawful, since they were without a warrant and were not made in connection with a lawful arrest at that time. Under the rule of *Mapp* v. *Ohio*, supra, 655, the evidence seized was inadmissible.

We come now to the question whether a new trial should be ordered. That depends on whether proper objection was made to the evidence claimed to have been erroneously admitted and whether the evidence was sufficiently conse-[fol. 18] quential to affect the finding of guilt. We have already noted that the objection was insufficient to raise the constitutional question; nevertheless, we have considered that question on the basis of the court's ruling denying the defendants the right to cross-examine the police officer. The defendants do not claim, nor, as the transcript shows, could they claim, that the illegal search and seizure induced their admissions or confessions. Their claim is that, "[h]ad they been able to preclude the admission of the illegally seized evidence, [their] confessions would not have been admissible," under the rule of *State* v. *Doucette*, 147 Conn. 95, 98, 157 A.2d 487, because there was, apart from the confessions, insufficient evidence of the corpus delicti, that is, that the crime charged had been committed by someone. In other words, their claim is that the state, in order to prove that a crime had been committed, had to rely solely on the admission in evidence of the paint jar and the brush. The answer to that claim is that there was ample evidence besides the defendants' confessions and the jar of paint and the brush to prove that swastikas had been painted on the synagogue between the hours of 4 and 5 o'clock on the morning of February 1, 1960. This was sufficient to establish that the crime charged had been committed by someone. The confessions were not inadmissible on the ground claimed, and no other ground of inadmissibility is advanced.

The paint jar and the brush, which were exhibits, were, at most, cumulative. The transcript of the evidence of the state's case, in chief, discloses overwhelming evidence of

the guilt of the defendants. They were observed a block from the scene of the crime at approximately the time when it was committed, riding in an automobile without lights, and were brought to a stop only after a police officer had pursued them for upwards of a mile. When the police later in the morning came with warrants to arrest them, they admitted their guilt at once and attempted to excuse their conduct as a "prank." Both later freely confessed. We are not required to grant a new trial if we are "of the opinion . . . errors [at the trial] have not materially injured the appellant." General Statutes § 52-265; *State* v. *Goldberger*, 118 Conn. 444, 454, 173 A. 216; *Carroll* v. *Arnold*, 107 Conn. 535, 544, 141 A. 657; *State* v. *Stevens*, 65 Conn. 93, 95, 31 A. 496; 1 Wigmore, Evidence (3d Ed.) § 21. Under the circumstances of this case, a new trial is unwarranted.

There is no error.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the reporter of judicial decisions; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

.....

Reporter

[fol. 19]

IN SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

On Appeal from the Superior Court for Fairfield County

Nos. 5080-5081

STATE OF CONNECTICUT,

v.

HAROLD FAHY.

STATE OF CONNECTICUT,

v.

WILLIAM ARNOLD.

JUDGMENT—June 26, 1962

This appeal by the defendants, claiming error in the process, record and judgment, and in the proceedings and decision of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Superior Court, for Fairfield County on the 1st day of September, 1960, and came to this Court at its session at Hartford, on the first Tuesday of December, 1960; and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Superior Court, there is no error.

It is therefore considered and adjudged that there is no error.

By the Court,

Date of Judgment June 26, 1962

Decision announced July 10, 1962

J. Leo Campana, Clerk.

[fol. 20] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 21]

SUPREME COURT OF THE UNITED STATES

No. 449, October Term, 1962

HAROLD FAHY, Petitioner,

vs.

CONNECTICUT.

ORDER ALLOWING CERTIORARI—February 25, 1963

The petition herein for a writ of certiorari to the Supreme Court of Errors of the State of Connecticut is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 19

HAROLD FAHY and WILLIAM ARNOLD,
Petitioners,

—versus—

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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INDEX

CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

HAROLD FAHY and WILLIAM ARNOLD,
Petitioners,

v.

STATE OF CONNECTICUT,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

Harold Fahy and William Arnold, petitioners herein, respectfully pray that a writ of certiorari issue to review the final judgment of the Supreme Court of Errors of the State of Connecticut entered on the 26th of June, 1962, affirming the judgments of the Superior Court for Fairfield County at Bridgeport convicting petitioners of the felony of willfully injuring a public building.

OPINION BELOW

The opinion of the Supreme Court of Errors is reported at ——— Conn. ——— and at 183 A. 2d 256 and appears in Appendix B, *infra*, p. B-1.

JURISDICTION

The judgment of the Supreme Court of Errors was entered on June 26, 1962. The jurisdiction of this court is invoked under 28 U. S. C. § 1257 (3). The constitutional question was originally raised in the trial court (R. 11, T. 40)* and assigned as error (R. 13) to the Supreme Court of Errors, which ruled specifically thereon (*infra*, Appendix B).

QUESTION PRESENTED

May a violation of petitioners' constitutional rights properly be characterized by the Connecticut Supreme Court of Errors as harmless error not warranting a new trial where that Court found that evidence obtained through an illegal search and seizure was erroneously considered by the trier of fact and where the illegally seized evidence not only was recited in the finding of the trial court, but also formed the basis for the admission of other evidence of guilt which was likewise considered by the trier of fact?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment.

STATUTORY PROVISION INVOLVED

The statute involved is Section 53-45 of the Connecticut General Statutes (1958) as amended by Public Act 437 (1959), *infra*, Appendix A-1.

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*The parenthetical numbers prefaced by the letter "T" refer to the pages of the certified transcript of the trial court proceeding. The parenthetical numbers prefaced by the letter "R" refer to pages of the certified record on appeal to the Connecticut Supreme Court of Errors.

STATEMENT OF THE CASE

Petitioners were charged in informations dated February 10, 1960, with willful injury to public property in violation of Connecticut General Statutes Sec. 53-45, a felony (R. 1-2, 4-5). Petitioners pleaded not guilty and were tried before Bogdanski, J. in the Superior Court for Fairfield County at Bridgeport on June 28, 1960 and were found guilty as charged and sentenced to sixty (60) days in the County Jail at Bridgeport (R. 3, 7).

On February 1, 1960, between the hours of 4:00 and 5:00 a.m. swastikas were painted with black paint in several places on the Synagogue Beth Israel in the City of Norwalk, Connecticut. (R. 10) At about 4:40 a.m. on that date, Officer Osborne Lindwall of the Norwalk Police Department saw an automobile without headlights operating on a public highway in Norwalk about a block away from the synagogue. (R. 10) The officer pursued the vehicle and caused it to stop. (R. 10) Petitioner Fahy was driving this vehicle and petitioner Arnold was a passenger therein. Officer Lindwall searched the vehicle and questioned petitioners about their reason for being out at that hour. Petitioners told him that they had been out for coffee at a diner and were returning to Fahy's home. In the course of searching the car, Officer Lindwall found a jar of black paint and a paint brush but did not remove them. (R. 10, T. 16) After completing his search and questioning of the petitioners, Officer Lindwall released them and they returned to Fahy's home. (T. 25) Later the same morning Officer Lindwall learned of the painting of the swastikas upon the synagogue, and thereafter at approximately 7:30 a.m. he went to petitioner Fahy's home and, without possessing a search warrant or obtaining the permission of the petitioner, entered the garage located under the Fahy home and removed a jar

of paint (State's Exhibit E) and a two-inch paint brush (State's Exhibit F) from a parked car. (R 11)

Counsel for the petitioners were precluded by the trial court from examining Officer Lindwall in an effort to establish that the paint jar and the paint brush were obtained through an unlawful search and seizure. The trial court found that:

> "Officer Lindwall testified that he went to the Fahy home on Wilson Point in South Norwalk before obtaining a warrant for the arrest of either defendant and before he had obtained a search warrant to search the premises, and entered the garage of the Fahy home which is situated under the house. He then removed the paint and paint brush allegedly used to apply paint to the Temple. Defendants' counsel was precluded by the Court upon the State's objection from pursuing his examination of Officer Lindwall in an effort to establish the unlawful search and seizure of the paint and paint brush." (R 11)

The Supreme Court of Errors of the State of Connecticut held that the search of the Fahy premises and the seizure of the paint jar and paint brush were unlawful and were in violation of petitioners rights under the 14th Amendment to the Constitution and that the trial court committed error in admitting the unlawfully seized paint jar and paint brush. (Appendix B)

The admission of unlawfully obtained evidence which was itself considered by the trial court in reaching its verdict (R 11) also provided a basis for the admission of other damaging evidence. Thus the court found that:

> "The two-inch paint brush matched the markings made with black paint upon the synagogue." (R 11)

The court also found that:

> "Both defendants admitted that they were the ones who had painted the swastikas on the synagogue

and they admitted that the paint and the brush found in the car had been used by them for that purpose." (R 11)

Furthermore, the admission of the paint jar and paint brush corroborated and enhanced the credibility of the testimony of the state's leading witness, Officer Lindwall, to the effect that he had found a paint jar and paint brush under the front seat of Fahy's car while conducting a search of that vehicle at 4:40 a.m. on February 1, 1960.

Petitioners assigned as error the ruling of the trial court with respect to the admission of the paint jar and paint brush. (R 13) The Supreme Court of Errors of the State of Connecticut held that although the admission of the paint jar and paint brush had violated the petitioners constitutional rights, a new trial would not be granted because the illegally obtained evidence had not materially injured the petitioners since there was other evidence of guilt to support the convictions.

REASONS FOR GRANTING WRIT

The Connecticut Supreme Court of Errors has held that an error of constitutional dimension is harmless if there is sufficient other evidence of guilt to support a conviction.* So holding, it has bowed to the conclusion of this court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961) that "evidence obtained by searches and seizures in violation

*The Supreme Court of Errors of the State of Connecticut expressly held that the trial court committed error in permitting the respondent to introduce into evidence a paint jar and a paint brush which were obtained by means of an unlawful search and seizure (Appendix B). The constitutional issue, having been presented to and expressly decided by both the trial court and the Supreme Court of Errors, is properly before this Court for review. *Whitney* v. *California*, 274 U. S. 357 (1927); *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123 (1914); *Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U. S. 182 (1945).

of the Constitution is inadmissible in a state court" and then placed itself squarely in conflict with the admonition of this Court in that same case that "the right to be secure against rude invasions of privacy by state officers . . . is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause." 367 U. S. 655 at page 660.

The holding of the court below relegates the constitutional safeguards of the Fourteenth Amendment to a mere rule of evidence rather than a constitutional standard for the conduct of criminal trials, the violation of which vitiates a conviction. The question posed is one on which the Courts of Appeals are presently in conflict. The Eighth Circuit and the District of Columbia Circuit have held that the admission of evidence obtained in violation of a constitutional right is never harmless error. *Williams* v. *United States*, 263 F2d 487, 490 (D. C. Cir. 1959); *Honig* v. *United States*, 208 F2d 916, 921 (8th Cir. 1953). This conclusion also appears as dictum in *Starr* v. *United States*, 264 F2d 377, 381 (D. C. Cir. 1958).

A contrary result was reached by the Second Circuit and by one case in the District of Columbia Circuit decided prior to *Williams* and *Starr*. *United States* v. *McCall*, 291 F2d 859, 860 (2d Cir. 1961); *Woods* v. *United States*, 240 F2d 37, 40 (D. C. Cir. 1956) cert. den. 353 U. S. 941. These cases hold that the violation of the constitutional rights of an accused does not require reversal of his conviction where there is ample evidence entirely unrelated to the tainted evidence upon which the trier of fact could base a conviction. This conclusion also appears as dictum in *Fraker* v. *United States*, 294 F2d 859, 861 (9th Cir. 1961).

Aside from the decision of this Court in *Mapp*, the only body of law to which the state courts may presently look for guidance as to the manner of enforcing constitutional guaranties against unlawful searches and seizures consists of

the small group of federal cases cited above, which were decided under the Fourth Amendment. As noted, these cases are hopelessly divided. Accordingly, we respectfully submit that it is imperative in the interests of uniform enforcement of the constitutional guarantees of the Fourteenth Amendment throughout the fifty states that certiorari be granted so as to resolve for all the question of whether the violation of constitutional rights of an accused by introduction of illegally seized evidence requires reversal of a conviction. This question, we submit, was erroneously resolved by the court below.

I

REVERSAL IS REQUIRED AS A MEANS OF ENFORCING THE CONSTITUTIONAL GUARANTEES AGAINST UNLAWFUL SEARCHES AND SEIZURES.

This court has repeatedly held that enforcement of rights guaranteed by the Fifth and Fourteenth Amendments requires reversal of all criminal convictions where unlawfully obtained confessions are admitted into evidence. *Rogers* v. *Richmond*, 365 U. S. 534, 545 (1960); *Malinski* v. *New York*, 324 U. S. 401, 404 (1944); *Lyons* v. *Oklahoma*, 322 U. S. 596, 597 (1943). For example in *Lyons* v. *Oklahoma*, 322 U. S. 596 this Court said:

> "Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over defendant's objection. If such admission of his confession denied a constitutional right to defendant the error requires reversal." 322 U. S. 596 footnote page 597.

The same conclusion was reached in *Rogers* v. *Richmond*, 365 U. S. 534:

"Our decisions under that Amendment [i.e. the 14th] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e. the product of coercion, either physical or psychological, cannot stand."

"Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which * * * an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees." 365 U. S. 534 at page 540

"A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment * * * To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension." 365 U. S. 534 at page 545

In *Mapp* v. *Ohio*, 367 U. S. 643 this Court, stressed the intimate relationship between the Fourth and Fifth Amendments, describing them as running "almost into each other" (367 U. S. 643 at page 646) and characterized the use of unconstitutionally seized physical evidence as "tantamount to coerced testimony." 367 U. S. 643 at page 656. After reviewing the history of enforcement by the state courts of the right to be free from unlawful searches and seizures, the Court concluded that effective enforcement of that constitutional right requires that the same stringent rule be ap-

plied as in the case of coerced confessions. (367 U. S. 643 at page 657).

Petitioners' convictions followed the admission of unconstitutionally obtained evidence and therefore the failure of the court below to grant a new trial was error.

II

PETITIONERS WERE DEPRIVED OF A FAIR TRIAL WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners' convictions must be reversed not only because their constitutional rights with respect to unlawful searches and seizures were violated but also because the admission of the unlawfully obtained evidence deprived them of a fair trial within the meaning of the Due Process Clause of the Fourteenth Amendment. The use of unlawfully obtained evidence by the prosecution should alway result in reversal of an ensuing conviction but reversal is even more mandatory where, as here, the unlawfully obtained evidence was offered by the prosecution and admitted by the court for the avowed purpose of establishing the guilt of the accused. Thus in *Bram* v. *United States*, 168 U. S. 532 (1897) the Court said:

> "Having been offered as a confession and being admissible only because of that fact a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a

confession was not prejudicial because it did not tend to prove guilt." 168 U. S. 532, at page 541.

In the instant case, the unlawful evidence was not only considered by the trial court as tending to establish guilt (R 11) but it also formed the foundation for the admission of other damaging evidence. The trial court found:

1. That the paint jar (State's Exhibit E) and the two inch paint brush (State's Exhibit F) were the same items which Officer Lindwall had purportedly seen in petitioner Fahy's car on February 1, 1960 (R 11).

2. That the unlawfully seized paint brush matched the markings made with black paint upon the synagogue (R 11).

3. That the petitioners admitted using the unlawfully seized articles to paint swastikas on the synagogue. (R 11)

Aside from these specific findings it is impossible to estimate or discover the overall impact which the unlawful evidence had on the trier of fact. Since the trial court expressly considered the tainted evidence in reaching its verdict, it is impossible for this Court or for anyone else to ascertain what part the unlawfully obtained evidence played in its decision. *Gallegos* v. *Colorado*, U. S. , 30 Law Week 4430 (1962); *Kotteakos* v. *United States*, 328 U. S. 750, 764 (1945); *United States* v. *Levi*, 177 F 2d 827, 831 (7th Cir. 1949). Accordingly, petitioners should be granted a new trial at which only lawful evidence will be considered.

CONCLUSION

In conclusion, on the facts and law, we respectfully urge this court to grant this Petition for the reason that these petitioners were deprived of their liberty and property without due process of law under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX A

Section 53-45 of the Connecticut General Statutes (1958) as amended by Public Act 437 (1959):

> "*Injury to public buildings, furniture or voting booths.* (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both. (b) Any person who wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

APPENDIX B

STATE OF CONNECTICUT *v.* HAROLD FAHY
STATE OF CONNECTICUT *v.* WILLIAM ARNOLD

SUPREME COURT OF ERRORS

APRIL TERM, 1962

Judgment June 26, 1962

Announced July 10, 1962

Informations charging the defendants with the crime of wilful injury to public property, brought to the Superior Court in Fairfield County and tried to the court, *Bogdanski, J.*; judgment of guilty in both cases and appeal by the defendants. *No error.*

Francis J. McNamara, Jr., for the appellant (defendant in the first case).

John J. Sullivan, for the appellant (defendant in the second case).

John F. McGowan, assistant state's attorney, with whom, on the brief, was *Otto J. Saur*, state's attorney, for the appellee (state).

BALDWIN, C. J. The defendants were tried on separate informations charging wilful injury to public property under General Statutes § 53-45, as amended by No. 437, § 1, of the 1959 Public Acts. The factual and legal issues in the cases are identical, and the cases were tried together to the court without a jury. The court found the defendants

guilty as charged and sentenced each of them to sixty days in jail. They have appealed.

The trial court found the following facts: On February 1, 1960, between the hours of 4 and 5 a.m., swastikas were painted with black paint on the steps and on the casing between two basement windows of the Temple Beth Israel, on Concord Street in Norwalk. About 4:40 a.m., Osborn Lindwall, a Norwalk police officer, saw an automobile, without its headlights on, being operated on a public highway about a block away from this synagogue. He signaled the car to stop but was obliged to pursue it in his police car for about a mile before it was halted. The defendant Fahy was driving the car, and the defendant Arnold was a passenger. Lindwall questioned them about their reason for being out at that hour, and they told him that they had been to a diner for coffee and were going home. Fahy had no license to operate a motor vehicle, and the officer insisted that Arnold drive. The officer checked the car and found a jar of black paint and a two-inch paint brush under the front seat. He followed the car to Fahy's home. Later the same morning, he learned of the painting of the swastikas on the synagogue and reported that he had seen the defendants in that vicinity. Police officers then went to Fahy's home and placed both defendants under arrest. They found the jar of black paint and the brush in the car in which the defendants had been riding when they were stopped earlier in the morning. The two-inch paint brush matched the markings made with black paint on the synagogue. The defendants admitted that they had painted the swastikas on the synagogue and that the paint found in the car had been used for that purpose.

The defendants claim, first, that the informations do not charge an offense under General Statutes § 53-45, as

amended by Public Acts 1959, No. 437.[1] They concede that the synagogue is a public building but contend that the painting of the swastikas on it does not constitute a wilful injury within the intent of the statute. Their argument is predicated on the legislative history of this act. As originally enacted in 1832, the pertinent portion provided that, "if any person shall wilfully and maliciously injure or deface any house of public worship, school-house, or other public building," he should be subject to penalties. Public Acts 1832, c. 9, § 2; Statutes, 1838, p. 182, § 2. This wording continued without material alteration until the Revision of 1875, when the words "or deface" were omitted, among other changes. General Statutes, Rev. 1875, p. 500, § 3. Since 1875, the wording of the phrase with which we are concerned has remained unchanged. The defendants claim that by the omission of the words "or deface" the legislature intended to treat the word "deface" as distinct from the word "injure." They argue that although the painting of swastikas on a building may be a defacement, it is not an

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[1]Prior to the action of the 1959 legislature, the statute read: "Sec. 53-45. INJURY TO PUBLIC BUILDINGS, FURNITURE OR VOTING BOOTHS. Any person who wilfully injures any public building or wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

The 1959 public act, effective June 11, 1959, was as follows: "No. 437. AN ACT CONCERNING INJURY TO PUBLIC BUILDINGS. Section 1. Section 53-45 of the general statutes is repealed and the following is substituted in lieu thereof: (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both. (b) Any person who wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

injury to the building. A contrary holding is to be found in *Vaughn* v. *May*, 217 Mo. App. 613, 625, 274 S. W. 969.

In seeking to ascertain the intent of legislation, "[i]t is presumed that changes in the language of a statute made when it is incorporated into a revision are not intended to alter its meaning and effect, and this is particularly true of the Revision of 1875." *Castagnola* v. *Fatool*, 136 Conn. 462, 468, 72 A.2d 479, and cases cited. It is therefore to be assumed that the revisers in 1875 considered that the word "injure" conveyed the meaning of "injure or deface." The words have been judicially interpreted as synonymous. *Saffell* v. *State*, 113 Ark. 97, 99, 167 S. W. 483. The 1959 public act (No. 437) by its terms purported to repeal § 53-45 of the 1958 Revision but at the same time again adopted the language of the 1875 Revision which is material to us. Whether a new provision is in the form of a new enactment repealing the old, as in this case, or the form of an amendment of the old is immaterial and depends on the preference of the draftsman. *Simborski* v. *Wheeler*, 121 Conn. 195, 200, 183 A. 688. The 1959 public act was, in effect, merely an amendment to § 53-45 of the General Statutes. See Prefatory Statement, Public Acts 1959. An amendatory act is presumed not to change the existing law further than is expressly declared or necessarily implied. *Norwalk* v. *Daniele*, 143 Conn. 85, 89, 119 A. 2d 732. Nothing in the 1959 act either expressly declares or necessarily implies a change in the meaning of the language under scrutiny. The informations therefore charged an offense under § 53-45 as amended by No. 437, § 1, of the 1959 Public Acts.

The defendants assign error in the alleged refusal of the trial court to allow them to pursue their cross-examination of Officer Lindwall in an effort to establish the unlawful search and seizure of a paint jar and paint brush from Fahy's car when it was in a garage under the house where

Fahy resided. After the date of the judgments, June 30, 1960, and while these appeals were pending, the Supreme Court of the United States announced its decision in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. This decision abrogated our prior law that relevant evidence, though obtained by unreasonable search and seizure in violation of the federal constitution, was admissible in evidence in our state courts. *State* v. *DelVecchio*, 149 Conn. (23 Conn. L. J., No. 31, p. 9); see *State* v. *Carol*, 120 Conn. 573, 575, 181 A. 714; *Pickett* v. *Marcucci's Liquors*, 112 Conn. 169, 173, 151 A. 526; *State* v. *Reynolds*, 101 Conn. 224, 233, 125 A. 636; *State* v. *Magnano*, 97 Conn. 543, 117 A. 550; *State* v. *Griswold*, 67 Conn. 290, 305, 34 A. 1046. The rule of *Mapp* v. *Ohio*, supra, applies to a pending appeal. *State* v. *DelVecchio*, supra.

The finding concerning the ruling on evidence assigned as error, as corrected by the trial court subsequent to the decision in *Mapp* v. *Ohio*, supra, and before argument before us, discloses the following: Lindwall testified that he went to the Fahy residence before obtaining a search warrant to search the premises and that he entered the garage and removed the paint jar and the paint brush from the car. The defendants sought to examine Lindwall in order to establish that the paint and the brush were unlawfully seized, in violation of their rights under the fourth and fourteenth amendments to the federal constitution and article first, § 8, of the constitution of this state. The court precluded the defendants from pursuing this examination, on objection by the state that any illegal seizure of the paint jar and the brush did not prevent their admission in evidence in a state court. In argument before us on April 3, 1962, the question was raised by the state whether the corrected finding was sufficient for us fully to consider the error claimed. After the argument, the defendants moved

that a certified transcript of the evidence taken at the trial be made a part of the record on appeal. The state acquiesced in the motion. Since the evidential ruling involved a matter as to which there had been a change in the law after the case was tried, the appeal taken and the original finding made, we granted the motion. *State* v. *Kreske,* 130 Conn. 558, 562, 36 A. 2d 389.

An examination of the transcript discloses the following: The state, in its case in chief, produced William Tarsi of the Norwalk police department. He testified that on February 1, 1960, at about 6:55 a.m., he observed swastikas painted in black paint on the synagogue, and that they had not been there when he observed the building at 4 a.m. that morning. The state then called Officer Lindwall, who testified to the facts already recited as having been found by the court, as follows: At about 4:40 a.m., he saw the Fahy car being operated, without lights on, about a block from the synagogue. He pursued the car until it stopped, and he questioned the defendants, who were riding in it. He observed a jar of paint and a brush in the car but did not take them into his custody. He allowed the defendants to proceed to Fahy's home and followed them until their car turned into the driveway.

The transcript further discloses the following evidence: When Lindwall learned, about 7:30 a.m., that swastikas had been painted on the synagogue, he went to Fahy's house, entered the garage and took the jar of paint and the brush from the car. On cross-examination, Lindwall testified that he entered the garage, that he removed the jar of paint and the brush from the car in the garage, and that he had no search warrant. Thereupon, he was asked whether he had applied for a search warrant, and the state objected. The court sustained the objection and refused to allow any further inquiry, on the ground, in effect, that the lack of a search warrant was immaterial.

Although the defendants objected to the admission of the paint jar and the brush when they were first offered, the objection was not at that time based on an illegal search and seizure, and the court was not asked to rule on their admissibility in the light of any such claim. See *Casalo* v. *Claro*, 147 Conn. 625, 629, 165 A.2d 153; *State* v. *DeGennaro*, 147 Conn. 296, 304, 160 A.2d 480. The reason for the requirement that there be timely objection and exception and also an adequate statement of the claims on which the objection is based, in compliance with the rules of procedure (Practice Book § 155), are well stated in a concurring opinion by Judge Van Voorhis in *People* v. *Friola*, 11 N. Y. 2d 157, 160, 182 N. E. 2d 100, a case which also involved the application of the *Mapp* decision, supra: "Courts are continually reconsidering old precedents and, if no objection or equivalent was required here, objection would never be necessary to raise a question of law where it is urged that some former decisional law be changed. That would not accord with the purposes of the rule requiring an objection, which is to apprise the court and the adversary of the position being taken when the ruling is made. It is important to know at the time that rulings are being challenged so that additional evidence or argument may be presented and the point considered by the trial court with knowledge that the rule is being contested."

The specific ruling of which the defendants complain is the refusal of the court to allow them to cross-examine Officer Lindwall to show that the search and the seizure were illegal. The transcript reveals that much of the necessary evidence was already in the case and, further, that the defendants had ample opportunity to, and in fact did, elicit testimony from Lindwall on cross-examination adequate to lay a foundation for their claim. While the defendants failed to make proper objection to the admission of the

evidence, they attempted later in the trial to raise the issue of the constitutionality of the search and the seizure, and we will consider it. See *People* v. *O'Neill*, 11 N. Y. 2d 148, 152, 182 N. E. 2d 95.

Security of one's privacy against arbitrary intrusion by the police is guaranteed by the federal constitution as well as by the constitution of this state. U. S. Const. Amend. IV, XIV § 1; Conn. Const. Art. I § 8; *Wolf* v. *Colorado*, 338 U. S. 25, 27, 69 S. Ct. 1359, 93 L. Ed. 1782. This protection extends to the premises where an unreasonable search is made. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374. Probable cause for a belief that certain articles subject to seizure are in a dwelling cannot in and of itself justify a search without a warrant. *Jones* v. *United States*, 357 U. S. 493, 497, 78 S. Ct. 1253, 2 L. Ed. 2d 1514; *Agnello* v. *United States*, 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145. There are no exceptional circumstances in this case which would warrant the search and seizure here—circumstances such as the necessity for immediate seizure lest the criminals flee, or the articles be transported out of reach, before a lawful warrant could issue. See *United States* v. *Jeffers*, 342 U. S. 48, 52, 72 S. Ct. 93, 96 L. Ed. 59; *Johnson* v. *United States*, 333 U. S. 10, 15, 68 S. Ct. 367, 92 L. Ed. 436; *Carroll* v. *United States*, 267 U. S. 132, 151, 45 S. Ct. 280, 69 L. Ed. 543. The search took place about two hours before the arrest and cannot be justified as incidental to it. *Rios* v. *United States*, 364 U. S. 253, 261, 80 S. Ct. 1431, 4 L. Ed. 2d 1688; *United States* v. *Di Re*, 332 U. S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210; *State* v. *DelVecchio*, 149 Conn. (23 Conn. L. J., No. 31, p. 9). The facts show that the officers had ample opportunity for procuring a search warrant without employing the method of illegal entry. See *Johnson* v. *United States*, supra. We conclude, therefore,

that the search and the seizure by Lindwall at 7:30 a.m. were unlawful, since they were without a warrant and were not made in connection with a lawful arrest at that time. Under the rule of *Mapp* v. *Ohio*, supra, 655, the evidence seized was inadmissible.

We come now to the question whether a new trial should be ordered. That depends on whether proper objection was made to the evidence claimed to have been erroneously admitted and whether the evidence was sufficiently consequential to affect the finding of guilt. We have already noted that the objection was insufficient to raise the constitutional question; nevertheless, we have considered that question on the basis of the court's ruling denying the defendants the right to cross-examine the police officer. The defendants do not claim, nor, as the transcript shows, could they claim, that the illegal search and sezure induced their admissions or confessions. Their claim is that, "[h]ad they been able to preclude the admission of the illegally seized evidence, [their] confessions would not have been admissible," under the rule of *State* v. *Doucette*, 147 Conn. 95, 98, 157 A.2d 487, because there was, apart from the confessions, insufficient evidence of the corpus delicti, that is, that the crime charged had been committed by someone. In other words, their claim is that the state, in order to prove that a crime had been committed, had to rely solely on the admission in evidence of the paint jar and the brush. The answer to that claim is that there was ample evidence besides the defendants' confessions and the jar of paint and the brush to prove that swastikas had been painted on the synagogue between the hours of 4 and 5 o'clock on the morning of February 1, 1960. This was sufficient to establish that the crime charged had been committed by someone. The confessions were not inadmissible on the ground claimed, and no other ground of inadmissibility is advanced.

The paint jar and the brush, which were exhibits, were, at most, cumulative. The transcript of the evidence of the state's case, in chief, discloses overwhelming evidence of the guilt of the defendants. They were observed a block from the scene of the crime at approximately the time when it was committed, riding in an automobile without lights, and were brought to a stop only after a police officer had pursued them for upwards of a mile. When the police later in the morning came with warrants to arrest them, they admitted their guilt at once and attempted to excuse their conduct as a "prank." Both later freely confessed. We are not required to grant a new trial if we are "of the opinion . . . errors [at the trial] have not materially injured the appellant." General Statutes § 52-265; *State* v. *Goldberger*, 118 Conn. 444, 454, 173 A. 216; *Carroll* v. *Arnold*, 107 Conn. 535, 544, 141 A. 657; *State* v. *Stevens*, 65 Conn. 93, 95, 31 A. 496; 1 Wigmore, Evidence (3d Ed.) § 21. Under the circumstances of this case, a new trial is unwarranted.

There is no error.

In this opinion the other judges concurred.

IN THE

Supreme Court of the United States

No. [illegible] 19

OCTOBER TERM, 1962

HAROLD FAHY and WILLIAM ARNOLD,
Petitioners,

vs.

STATE OF CONNECTICUT.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CASES CITED

IN THE

Supreme Court of the United States

No. 449

OCTOBER TERM, 1962.

HAROLD FAHY and WILLIAM ARNOLD,
Petitioners,

vs.

STATE OF CONNECTICUT.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Question Presented

Must the conviction of the petitioner be set aside and a new trial ordered merely because of the admission of cumulative evidence obtained through an illegal search and seizure when the highest State Court has held that there appeared of record overwhelming evidence of guilt of the petitioners independent of it?

ARGUMENT.

The petition for a Writ of Certiorari should be denied on the ground that a conflict on the Question Presented in the Courts of Appeals would not be a ground for hearing this case. This case was heard in a State trial court and appeal was taken to the Supreme Court of Errors of the State of Connecticut where a decision was rendered upholding the conviction on the ground that the admission of the paint jar and brush, though inadmissible under the rule of **Mapp v. Ohio**, 367 U.S. 643, was at most cumulative, and that the "state's case, in chief, discloses overwhelming evidence of guilt of the defendants".

Further it is questionable whether or not there is a real conflict within the various Courts of Appeals. In **Williams v. United States**, 263 F2d 487 (D.C. Cir. 1959); in **Honig v. United States**, 208 F2d 916 (8th Cir. 1953), cited by the petitioner for the proposition that the admission of evidence obtained in violation of a constitutional right is never harmless error, the Court of Appeals was called upon to determine first, whether or not certain evidence was obtained as a result of an illegal search and seizure and then to answer whether or not the government might have offered independent evidence of guilt. In these cases, however, the Court failed or refused to find that there was ample evidence entirely unrelated to the tainted evidence upon which the trier of fact could have based a conviction as was done by the Court in **United States v. McCall**, 291 F2d 859 (2d Cir. 1961); **Woods v. United States**, 240 F2d 37 (D.C. Cir. 1956) cert. denied, 353 U.S. 941.

I.

Reversal Is Not Required As a Means of Enforcing the Constitutional Guarantees Against Unlawful Searches and Seizures.

Petitioner's position that in every case where a constitutional violation appears must result in a reversal is untenable. Assume that in a criminal case an illegal search takes place, but no evidence is found or offered as a result of it. In the same case, however, evidence is introduced by the government that establishes guilt beyond a reasonable doubt. Certainly no one could contend that the decision must be reversed merely because a bare unconstitutional violation was perpetrated. Respondent contends that the situation, in essence, is identical in this case. Here the Connecticut Supreme Court of Errors held that there was as a matter of law, substantial independent evidence of guilt in the record without reference to the illegally admitted evidence. Further, the petitioner has never contended that his subsequent confessions and admissions were inadmissible because they were the fruit of the illegal search and seizure.

II.

Petitioner Was Not Deprived of a Fair Trial Within the Meaning of the Due Process Clause of the Fourteenth Amendment.

The appearance of harmless error in the record has not deprived the petitioner of a fair trial within

the meaning of the Due Process clause of the Fourteenth Amendment.

The Connecticut Supreme Court of Errors in upholding the conviction in the lower court stated:

> "We are not required to grant a new trial if we are of the opinion . . . errors [at the trial] have not materially injured the appellant". Conn. Gen. Stats. §52-265.

The Court was here referring to the "harmless error" statute which has its counterpart in §269 of the Judicial Code 28 USCA §391, 8 FCA, Title 28 §391, now Criminal Procedure Rule 52.

In the case of **Kotteakos v. United States**, 328 U.S. 750, a case involving the admission of certain evidence that was held to have been illegally obtained, the Court stated in reversing the conviction:

> "Error should not have been held harmless under the 'harmless error' statute if upon consideration of the record the Court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict."

In the **Kotteakos** case supra, the conviction was set aside because there was corroborative evidence on certain phases of the case but not on all phases. The test, as stated by the Court at page 764 is "what effect the error had or reasonably may be taken to have had upon the jury's decision."

In the petitioner's case, the evidence was heard by a one-judge court. The Connecticut Supreme Court of Errors held that the admission of the paint

jar and brush was improper because it was obtained by an illegal search and seizure but further held that the error was harmless because the transcript of the case discloses overwhelming proof of the guilt of the petitioner and the illegally admitted evidence would not have improperly influenced the lower court's decision.

CONCLUSION.

On the facts and law, we respectfully urge this court to deny this Petition for Certiorari.

Respectfully submitted,

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RESPONDENT'S APPENDIX A

1. Section 53-45 of the Connecticut General Statutes (1958) as amended by Public Act 437 (1959):

> **"Injury to public buildings, furniture or voting booths.** (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both.
>
> (b) Any person who wilfully injures or carries away any part of the heating plant or equipment or furniture in and belonging to any such building or wilfully defaces or injures a voting booth or compartment shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

2. Federal Rule Criminal Procedure Rule 52A. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

3. Sec. 52-265 of the Connecticut General Statutes (1949 Rev., S. 8006).

> **"Action of supreme court on appeals and writs of error.**
>
> On an appeal or writ of error, if the supreme court of errors finds errors in the rulings or decisions of the court below or of a judge thereof when the jurisdiction of any action or proceeding is or shall be vested in him, and unless it is

of the opinion that such errors have not materially injured the appellant or plaintiff in error, it may render judgment in favor of the appellant or plaintiff in error, together with his costs; or may remand the cause to the court below or to a judge thereof having jurisdiction, to be proceeded with by such court or by such judge to final judgment, in which case the whole costs, except the costs on the writ of error or appeal, shall be taxed in favor of the prevailing party, and the costs in the supreme court of errors shall be taxed in favor of the plaintiff in error or appellant."

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 19

HAROLD FAHY and WILLIAM ARNOLD,
Petitioners,

versus

STATE OF CONNECTICUT,
Respondent.

REPLY BRIEF OF PETITIONER HAROLD FAHY

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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

HAROLD FAHY and WILLIAM ARNOLD,
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vs.

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Respondent.

No. 449

REPLY BRIEF OF PETITIONER HAROLD FAHY

Argument

I.

With respect to Point 1 of respondent's brief, we wish merely to point out that the hypothetical case assumed by respondent is based on an erroneous characterization of the petitioner's position. As pointed out on pages 7-9 of the Petition for Certiorari, petitioner contends that where, as here, the fruits of an illegal search and seizure are offered by the prosecution for the purpose of establishing guilt and are admitted, considered and relied on by the trier of fact as evidence tending to establish the guilt of the accused, the conviction must be reversed.

II.

At p. 4 of its Brief, respondent asserts that *Kotteakos* v. *United States,* 328 U. S. 750 involved ". . . the admission of certain evidence that was held to have been illegally ob-

tained . . ." and cites the case as authority for the proposition that an error of constitutional dimension is nonetheless within the purview of the federal harmless error rule (presently Fed. R. Crim. P. 52).

Kotteakos did not involve illegally obtained evidence. No constitutional question was involved.

Moreover, the court observed by way of dicta that:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and judgment should stand, *except perhaps where the departure is from a constitutional norm* or a specific command of Congress." 328 U. S. 750, 764-765. (Emphasis Supplied)

Conclusion

Since illegally obtained evidence was introduced by the prosecution and considered and relied upon by the trial court in reaching its verdict petitioner's conviction must be reversed.

Respectfully submitted,

FRANCIS J. MCNAMARA, JR.
Counsel for Petitioner Fahy

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 19

HAROLD FAHY,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Errors is reported at 149 Conn. 577 and at 183 A. 2d 256.

JURISDICTION

The judgment of the Supreme Court of Errors was entered on June 26, 1962. The petition for a writ of certiorari was filed on September 21, 1962, and granted on February 25, 1963. 372 U. S. 928. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment.

STATUTES INVOLVED

The statutes involved are Section 53-45 of the Connecticut General Statutes (1958 Rev.) as amended by Public Act 437 (1959) and Section 52-265 of the Connecticut General Statutes (1958 Rev.).

Section 53-45, as amended, provides in pertinent part:

> **"Injury to public buildings, furniture or voting booths.** (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both. . . ."

Section 52-265 provides in pertinent part:

> **"Action of supreme court on appeals and writs of error.** On an appeal or writ of error, if the supreme court of errors finds errors in the rulings or decisions of the court below or of a judge thereof when the jurisdiction of any action or proceeding is or shall be vested in him, and unless it is of the opinion that such errors have not materially injured the appellant or plaintiff in error, it may render judgment in favor of the appellant or plaintiff in error, together with his costs; or may remand the cause to the court below or to a judge thereof having jurisdiction, to be proceeded with by such court or by such judge to final judgment, . . ."

QUESTION PRESENTED

May a violation of petitioner's constitutional rights properly be characterized by the Connecticut Supreme Court of Errors as harmless error not warranting a new trial where that Court found that evidence obtained through an illegal search and seizure was erroneously considered by the trier of fact and where the illegally seized evidence not only was recited in the finding of the trial court, but also formed the basis for the admission of other evidence of guilt which was likewise considered by the trier of fact?

STATEMENT

Petitioner was charged in an information dated February 10, 1960, with wilful injury to a public building in violation of Sec. 53-45 of the Connecticut General Statutes, a felony (R. 1-2). Petitioner pleaded not guilty and was tried before Bogdanski, J. in the Superior Court for Fairfield County at Bridgeport on June 28, 1960. He was found guilty as charged and sentenced to sixty (60) days in the County Jail at Bridgeport (R. 3-4).

On February 1, 1960, between the hours of 4:00 and 5:00 A. M. swastikas were painted with black paint in several places on the synagogue Beth Israel in the City of Norwalk, Connecticut (R. 11). At about 4:40 A. M. on that date, Officer Osborne Lindwall of the Norwalk Police Department stopped an automobile operating without headlights on a public highway in Norwalk about a block away from the synagogue (R. 11). Petitioner Fahy was driving this vehicle and William Arnold, also a defendant at trial, was a passenger therein.* Officer Lindwall searched the

*Defendant William Arnold joined in the petition for certiorari, but subsequently withdrew.

vehicle and questioned defendants about their reason for being out at that hour. Defendants told him that they had been out for coffee at a diner and were returning to Fahy's home. In the course of searching the car, Officer Lindwall found a jar of black paint and a paint brush but did not remove them (R. 12). After completing his search and questioning the defendants, Officer Lindwall released them and they returned to Fahy's home (R. 12).

Later the same morning Officer Lindwall learned of the painting of the swastikas upon the synagogue. Thereafter, at approximately 7:30 A. M., he went to petitioner Fahy's home and, without possessing a search warrant or obtaining the permission of the petitioner, entered the garage located under the Fahy home and removed a jar of paint (State's Exhibit E) and a two-inch paint brush (State's Exhibit F) from a parked car (R. 12). Approximately two hours later, petitioner and William Arnold were arrested (R. 21).

At the trial, counsel for the defendants were precluded from examining Officer Lindwall in an effort to establish that the paint jar and the paint brush were obtained through an unlawful search and seizure. The trial court found that:

> "Officer Lindwall testified that he went to the Fahy home on Wilson Point in South Norwalk before obtaining a warrant for the arrest of either defendant and before he had obtained a search warrant to search the premises, and entered the garage of the Fahy home which is situated under the house. He then removed the paint and paint brush allegedly used to apply paint to the Temple. Defendants' counsel was precluded by the Court upon the State's objection from pursuing his examination of Officer Lindwall in an effort to establish the unlawful search and seizure of the paint and paint brush." (R. 13)

The Supreme Court of Errors of the State of Connecticut nevertheless found sufficient facts in the record to es-

tablish that the search of the Fahy premises and the seizure of the paint jar and paint brush were unlawful and were in violation of petitioner's rights under the Fourteenth Amendment to the Constitution. Accordingly, it held that the trial court committed error in admitting the unlawfully seized paint jar and paint brush (R. 22).

The admission of unlawfully obtained evidence which was itself considered by the trial court in reaching its verdict (R. 12) also provided a basis for the admission of other damaging evidence. Thus the court found that:

> "The two-inch paint brush matched the markings made with black paint upon the synagogue." (R. 12)

The admission of the paint jar and paint brush also corroborated and enhanced the credibility of the testimony of the state's leading witness, Officer Lindwall, to the effect that he had found a paint jar and paint brush under the front seat of Fahy's car while conducting a search of that vehicle at 4:40 A.M. on February 1, 1960.

Furthermore, at the conclusion of the prosecution's case the defendants testified in their own behalf and the court found that:

> "Both defendants admitted that they were the ones who had painted the swastikas on the synagogue and they admitted that the paint and the brush found in the car had been used by them for that purpose." (R. 12)

The Supreme Court of Errors of the State of Connecticut held that although the admission of the paint jar and paint brush had violated the petitioner's constitutional rights, a new trial would not be granted because the illegally obtained evidence had not materially injured the petitioner since there was other evidence of guilt adequate to support the conviction.

SUMMARY OF ARGUMENT

The admission in a criminal trial of evidence seized in an illegal search over the objection of the accused violates his constitutional right to have such evidence excluded. Where an accused has been tried in a manner which violates his constitutional rights, reversal is mandatory without regard to whether he can show that the judicial denial of his constitutional rights may have prejudiced the outcome of the trial.

Such a result is necessary to preserve respect for the courts as the guardians of our constitutional rights, to deter constitutional violations by undisciplined police officials, and to free appellate courts from speculation either as to the impact which the contaminated evidence had on the finder of fact or as to the impact it had on the accused in planning and conducting his defense.

In the instant case, the unconstitutional use of evidence tending to prove guilt was prejudicial to the accused and deprived him of a fair trial within the meaning of the Due Process clause of the Fourteenth Amendment. Testimony which connected petitioner with the crime could not have served that function without the contemporaneous use of illegally seized evidence. Moreover, the strength of the case thus unlawfully developed compelled petitioner to take the stand and testify as to the facts and circumstances of his conduct in an effort to show that such conduct was not within the scope of the felony statute under which he was charged. Such consequences were "fruit of the poisonous tree;" the inevitable consequence of allowing the State to base its case upon a constitutional violation.

Due process requires that the petitioner be granted a new trial conducted in accordance with constitutional guarantees.

Argument

I.

A NEW TRIAL IS REQUIRED WHERE CONVICTION FOLLOWS THE UNCONSTITUTIONAL USE OF UNLAWFULLY SEIZED EVIDENCE.

In *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961), this Court held that an accused has a right under the federal constitution to insist upon the exclusion from a state criminal proceeding of unconstitutionally obtained evidence. The Supreme Court of Errors of Connecticut, in affirming petitioner's conviction, recognized that constitutional error had been committed by the trial court but held, nevertheless, that the error was not of such stature as to require reversal because there was substantial other evidence in the record to support the conviction. The question thus posed is whether the action of a court in depriving an accused of his constitutional rights can ever be regarded as inconsequential.

A. The Failure to Follow Constitutionally Required Procedures Is Never Harmless Error.

There has been much divergence of opinion as to whether particular rights either expressly or impliedly contained in the Bill of Rights are also protected against state invasion by the Due Process Clause of the Fourteenth Amendment. However, once the Court has concluded that a particular concept of trial procedure is a fundamental right embodied in the Fourteenth Amendment, there has been no real dispute as to the effect of a state court's invasion of that right. Reversal is mandatory, without regard to whether the failure to afford the accused his constitutional rights may in fact have had a prejudicial effect on the outcome of the trial.

For example, this Court has held repeatedly that enforcement of rights guaranteed by the Fifth and Fourteenth Amendments requires reversal of all criminal convictions where unlawfully obtained confessions are admitted into evidence. *Lyons* v. *Oklahoma*, 322 U. S. 596, 597 (1943); *Malinski* v. *New York*, 324 U. S. 401, 404 (1944); *Rogers* v. *Richmond*, 365 U. S. 534, 545 (1960); *Haynes* v. *Washington*, ——U. S.——, 31 U. S. L. Week 4492, 4496 (May 27, 1963). In *Lyons* v. *Oklahoma* this Court said:

> "Whether or not the other evidence in the record is sufficient to justify the general verdict of guilt is not necessary to consider. The confession was introduced over defendant's objection. If such admission of his confession denied a constitutional right to defendant the error requires reversal." 322 U. S. 596, footnote page 597.

Similarly, in *Rogers* v. *Richmond*, the Court flatly rejected the contention that the constitutional violation might be overlooked if the coerced confession was truthful and hence not prejudicial:

> "Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees." 365 U. S. at 541.

* * *

> "A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This means that a vital confession, such as is involved in this case, may go to the jury only if it is subjected to screening in accordance with correct constitutional standards. To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension." 365 U. S. at 544-5.

The coerced confession cases are clear in their holding that, once a coerced confession is admitted into evidence, the Due Process Clause is violated and a new trial required. Neither the truthfulness of the confession nor its effect upon the verdict are material. Likewise, in cases in which the Court has held that the accused had a constitutional right to counsel, the Court "does not stop to determine whether prejudice resulted" from a denial of that right. *Hamilton* v. *Alabama*, 368 U. S. 52, 55 (1961); cf. *Gideon* v. *Wainwright*, —— U. S. —— 31 U. S. L. Week 4291 (March 18, 1963). Again, in holding that trial by an eleven man jury violated the Fifth Amendment, the Court dismissed the ". . . suggestion that by reducing the number of the jury to eleven or ten the infraction of the Constitution is slight, and the courts may be trusted to see that the process of reduction shall not be unduly extended. . . " with the observation that "It is not our province to measure the extent to which the Constitution has been contravened . . . " *Patton* v. *United States*, 281 U. S. 276, 292 (1929). Accordingly, once it has been determined that an unconstitutional trial procedure has been employed, it matters not that the procedure may in fact have been fair or the conviction well deserved. The error is grave, even though its effect on the accused may not be.

B. The Right to Have Unconstitutionally Seized Evidence Excluded from a Criminal Trial Is a Fundamental Right Guaranteed by the Due Process Clause and Not Merely a Rule of Evidence.

In *Wolf* v. *Colorado*, 338 U. S. 25 (1949) this Court held that the right of privacy expressed in the search and seizure clause of the Fourth Amendment also was a fundamental right protected from state infringement by the Due Process Clause of the Fourteenth Amendment. Thereafter in *Mapp* v. *Ohio*, 367 U. S. 643, 657 (1961) the Court held that the right of an accused to insist upon the exclusion of unconstitutionally seized evidence was an essential ingredient of both the Fourth and Fourteenth Amendments. In placing the right of exclusion on the level of constitutional doctrine the Court flatly rejected the proposition that it was a mere rule of evidence.

Although there were indications in a number of earlier cases that exclusion of illegally seized evidence from a federal criminal proceeding was an implied requirement of the Fourth Amendment, an independent ground for this requirement existed in the Supreme Court's superintending control over the federal judicial system. *McNabb* v. *United States*, 318 U. S. 332, 341, 345 (1943). To the extent that the exclusionary rule rested upon the rule-making power of the Court and Congress it would presumably be subject to either Congressional or judicial modification. cf. *Mapp* v. *Ohio*, 367 U. S. at 661 (concurring opinion); *Wolf* v. *Colorado*, 338 U. S. 25, 33 (1949). Accordingly, prior to this Court's decision in *Mapp* there was some basis for assuming that the exclusionary rule might be subject to the provisions of the federal harmless error statute. Fed. R. Crim. P. 52(a). See, e.g., *Kremen* v. *United States*, 353 U. S. 346, 348 (1956) (dissenting opinion); *United States* v. *McCall*, 291 F. 2d 859 (2d Cir. 1961).

The *Mapp* case, however, laid this problem to rest. The admission of illegally seized evidence over the objection of the accused was declared to be a violation of a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Stressing the intimate relationship between the Fourth and Fifth Amendments the Court described the use of unconstitutionally seized evidence as "tantamount to coerced testimony." (367 U. S. at 656.) The Court observed that whether the exclusionary right be derived from the Fourth, Fifth or Fourteenth Amendment, "the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." (367 U. S. at 657.) Thus the introduction of unconstitutionally seized evidence was placed in the same category as the introduction into evidence of a coerced confession, which had long been regarded as an unconstitutional trial procedure.

Such a procedural right, founded as it is on the Constitution itself, cannot be subjected to restrictions or conditions by state law. Yet the effect of the decision below is to deny petitioner his constitutional right to have illegally seized evidence excluded unless he can demonstrate prejudice. This is a condition that Connecticut has no more right to impose here than it would have in the case of a coerced confession. An accused is entitled to be tried according to constitutional standards and if those standards are not met the conviction cannot be sustained. See *Rogers* v. *Richmond*, 365 U. S. 534, 545 (1960).

C. The Reasons Underlying the Doctrine of Exclusion Are Incompatible with the Concept of "Harmless Error."

The constitutional right of an accused to require exclusion of illegally seized evidence is a deterrent to official lawlessness and a protection against state invasions of the

constitutional right of privacy. Its objective is not to punish officials for past misconduct in proportion to the harm caused to the accused, but rather to destroy the incentive for future constitutional violations. *Elkins* v. *United States*, 364 U. S. 206, 217 (1960). Accordingly, its application is just as necessary where the fruits of the invasion have negligible evidentiary value as where the seized evidence is essential to the conviction. The majority of the Court were clearly of that opinion in *Kremen* v. *United States*, 353 U. S. 346 (1956), which was decided at a time when the exclusionary doctrine was regarded by some as only a judicial rule. And, if the harmless error doctrine was not applicable then, it would indeed be anomalous to apply it now after the doctrine of exclusion has been recognized as a constitutional mandate.*

A second reason often given for the doctrine of exclusion is "the imperative of judicial integrity." *Elkins* v. *United States*, 364 U. S. 206, 222 (1960). Mr. Justice Stewart there summed up the eloquence of the past:

> "'For those who agree with me,' said Mr. Justice Holmes, 'no distinction can be taken between the Government as prosecutor and the Government as judge.' 277 U. S., at 470. (Dissenting opinion.) 'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself;

*The possible applicability of the harmless error doctrine was considered by the Court in the *Kremen* case. Justices Burton and Clark dissented partly on the ground that, ". . . if any items were illegally seized their effect should be governed by the rule of harmless error since there was ample evidence of guilt otherwise." 353 U. S. at 348.

it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' 277 U. S., at 485. (Dissenting opinion.)

"This basic principle was accepted by the Court in *McNabb* v. *United States*, 318 U. S. 332. There it was held that 'a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' 318 U. S., at 345. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold." (364 U. S., at 222-3)

Mapp v. *Ohio* teaches that the admission of illegally seized evidence at the trial is a violation by the trial court itself of the constitutional rights of an accused. The problem is now one of direct judicial disobedience to the Constitution, and not merely an indirect judicial approbation of a violation of the constitutional right of privacy by ill trained or lawless police officials. If our trial courts are adjured not to place the stamp of judicial approval upon the illegal acts of law enforcement agencies, still less should our appellate courts gloss over a disregard of constitutional rights by the trial court itself. What lesson will our courts teach if they can dismiss their own disregard of constitutional rights as harmless? The harm done to the accused may indeed be slight, but the harm done to the reputation of our courts as the guardians of our constitutional rights is irreparable. Integrity is not a matter of degree.

The right course is that which has unhesitatingly been followed by the Courts of Appeals for the District of Columbia and for the Eighth Circuit. *Williams* v. *United States*, 263 F. 2d 487, 490, 491 (D. C. Cir. 1959); *Honig* v. *United States*, 208 F. 2d 916, 921 (8th Cir. 1953). In the words of Judge Danaher in his concurring opinion in the *Williams* case:

> "If, perchance, the police are not familiar with the rules, the prosecutor is, or is presumed to be. The opinions referred to have cited many other cases which he should recognize. It is the duty of the prosecutor to know not only whom to prosecute, but *when*. Thus, in the course of preparation of his case for trial, absent 'exceptional circumstances,' seldom found, the prosecutor should appraise the available evidence and should apply the rules. Unhesitatingly he should refuse to go forward with the presentation of evidence which has been obtained by illegal police invasion of a private home. If his case *depends* upon such evidence, he should dismiss the prosecution. If he can present a case without the use of evidence illegally procured, it should not be offered. But if notwithstanding, he insists upon introducing evidence illegally gained through improper invasion of the sanctity of a dwelling, we should tell him once again and for all, we will reverse a conviction, as we now do." 263 F. 2d at 491.

The contrary view adopted by the court below makes the constitutional rights of the accused dependent upon his ability to demonstrate the prejudicial effect of the unlawful evidence on the outcome of the trial. That view is inconsistent with this Court's long standing practice with respect to the protection of similar fundamental rights; it is inconsistent with the function of the exclusionary doctrine as a deterrent to official lawlessness; and it compromises the integrity of our courts. We submit, therefore, that this case

should be reversed on the ground that the conviction has been vitiated by an error of constitutional dimension.

II.

PETITIONERS WERE DEPRIVED OF THE FAIR TRIAL REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Both reason and precedent seem to lead inescapably to the conclusion that an error of constitutional dimension ought never to be regarded as harmless. Conceivably, a case might one day arise in which the unconstitutional evidence admitted in the trial was utterly innocuous and undebatably lacking in any capacity to influence the finder of fact. In such a case the element of incrimination would be lacking, and the relationship to Fifth Amendment safeguards would fade. The argument that principle should yield to pragmatism might then gather some force. However, if there are such hypothetical limits to the doctrine of exclusion, they are certainly not reached in this case, for here the contaminated evidence was clearly incriminating and its impact permeated the entire trial.

As this record indicates, the uses to which illegally obtained evidence may be put are impressive in their variety and subtlety. If the findings of the trial court are examined, it is immediately apparent that the unlawful evidence was not only considered as tending to establish guilt but also formed the foundation for the admission of other damaging evidence of guilt. The trial court expressly found that:

> "8. In searching the car in which the defendants were riding, the officer found a can of black paint and a two-inch paint brush.
>
> * * * * *

13. The police found the same can of black paint and the brush in the car which the defendants had been operating when stopped by Officer Lindwall earlier in the morning.

14. The two-inch paint brush matched the markings made with black paint upon the synagogue." (R. 12).

It must be borne in mind that even a minor bit of tangible evidence may be the very element that gives another witness's testimony the ring of truth in the ears of a skeptical trier of fact. Here the tangible evidence, incriminating in itself, was also used to corroborate testimony of the police officer as to the presence of the petitioner near the scene of the crime at about the time it was committed and as to the presence of a paint jar and paint brush in petitioner's car at that time. The evidence was used again as the subject of opinion testimony to the effect that the paint brush and paint found in petitioner's possession matched the markings on the synagogue, thus forging another link between the accused and the crime charged.

This Court has repeatedly employed the doctrine referred to as "fruit of the poisonous tree" in order to exclude evidence lawfully obtained but which is the proximate result of evidence unlawfully seized. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *Nardone* v. *United States*, 308 U. S. 338 (1939). The use of such evidence to demonstrate the relationship of other evidence to the crime, or even to lend credence to otherwise unsubstantiated testimony, is certainly a fruit of the unconstitutional search and seizure, and the quoted findings are likewise a direct product of the use of illegally obtained evidence.

Thus, the introduction of such evidence has effects far beyond its own intrinsic evidential force. Another such effect is the impact of the evidence upon the accused in

determining the course of his defense. This is illustrated by the following findings of the trial court:

> "15. Both defendants admitted that they were the ones who had painted the swastikas on the synagogue and they admitted that the paint and the brush found in the car had been used by them for that purpose." (R. 12)
>
> 18. Detective Frank Tigano was permitted, over objection, to give his opinion concerning the material used to paint the Temple without any foundation being laid for such questioning and without qualifying Detective Tigano as an expert.
>
> 19. Detective Frank Tigano did testify that the swastikas had been marked upon the synagogue with a type of black paint. Subsequently, both defendants admitted that they had used the black paint found in their car for that purpose." (R. 13)

The admissions reflected in these findings bear mute testimony to the devastating effects which accompany denial of constitutional safeguards. The concept of ordered liberty embodied in the Fourteenth Amendment demands that no person be so placed, by violation of his constitutional rights, that self-incrimination becomes a practical if not a legal necessity. Admission of the paint brush and the paint jar and their subsequent use to support and corroborate other evidence so cemented the prosecution's case that petitioner was left no alternative but to take the stand, admit his responsibility for painting the synagogue and try to establish that the nature of his acts was not within the scope of the felony statute under which he had been charged.

Such consequences are not uncommon,* for it must be borne in mind that we are not dealing here with a mere

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*See, e.g., *United States* v. *McCall*, 291 F. 2d 859 (2d Cir. 1961) (having failed to exclude the evidence, and having failed to shake the expert testimony based thereon, accused took the stand and testified in mitigation).

technicality but rather with the denial of the fundamental right of the petitioner to have the contaminated evidence excluded. The natural effect of such a denial is prejudice to the accused. *Kotteakos* v. *United States,* 328 U. S. 750, 764-5 and note 19 (1946); cf. *United States* v. *Mineworkers,* 330 U. S. 258, 376 (1947) (dissenting opinion). Therefore the applicable rule is that announced in *Bram* v. *United States,* 168 U. S. 532, 541 (1897):

> "Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt." 168 U. S. at 541.

Accordingly, if the error itself is a departure from a constitutional norm, then, "An appellate court will not presume to evaluate the degree of prejudice in probativeness from relevant evidence obtained by illegal search and seizure whether the relevance of such evidence be immediate or remote. And no more will it undertake to appraise the effect of any irrelevant evidence so obtained and used where such evidence, through not relevant to the offense charged, is nevertheless not utterly innocuous but can debatably be said to be possessed of some capacity to influence a jury." *Honig* v. *United States,* 208 F. 2d 916, 921 (8th Cir. 1953).

In this case, the unlawfully seized paint brush and paint can were offered by the prosecution for the avowed purpose of proving guilt. They were relevant to the issue of guilt.

They were found by the trial court to be admissible on the issue of guilt. They were not ignored or disregarded but were considered by the court, as the trier of fact, and expressly mentioned in its findings. Furthermore these exhibits were the subject of testimony of other witnesses, which testimony was offered for the purpose of proving guilt, admitted for that purpose, considered for that purpose and relied upon for that purpose in the finding of the trial court. Like the proverbial one rotten apple in a barrel; the contaminated evidence spread its poison by adding force to other evidence until the accused was compelled to adopt the tactics of retreat and abandon his privilege against self-incrimination. Under such circumstances the use of the unconstitutional evidence cannot be dismissed as inconsequential regardless of how much other evidence of guilt may have been in the record.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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August 23, 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 19

HAROLD FAHY,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF OF THE RESPONDENT

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To be argued by:
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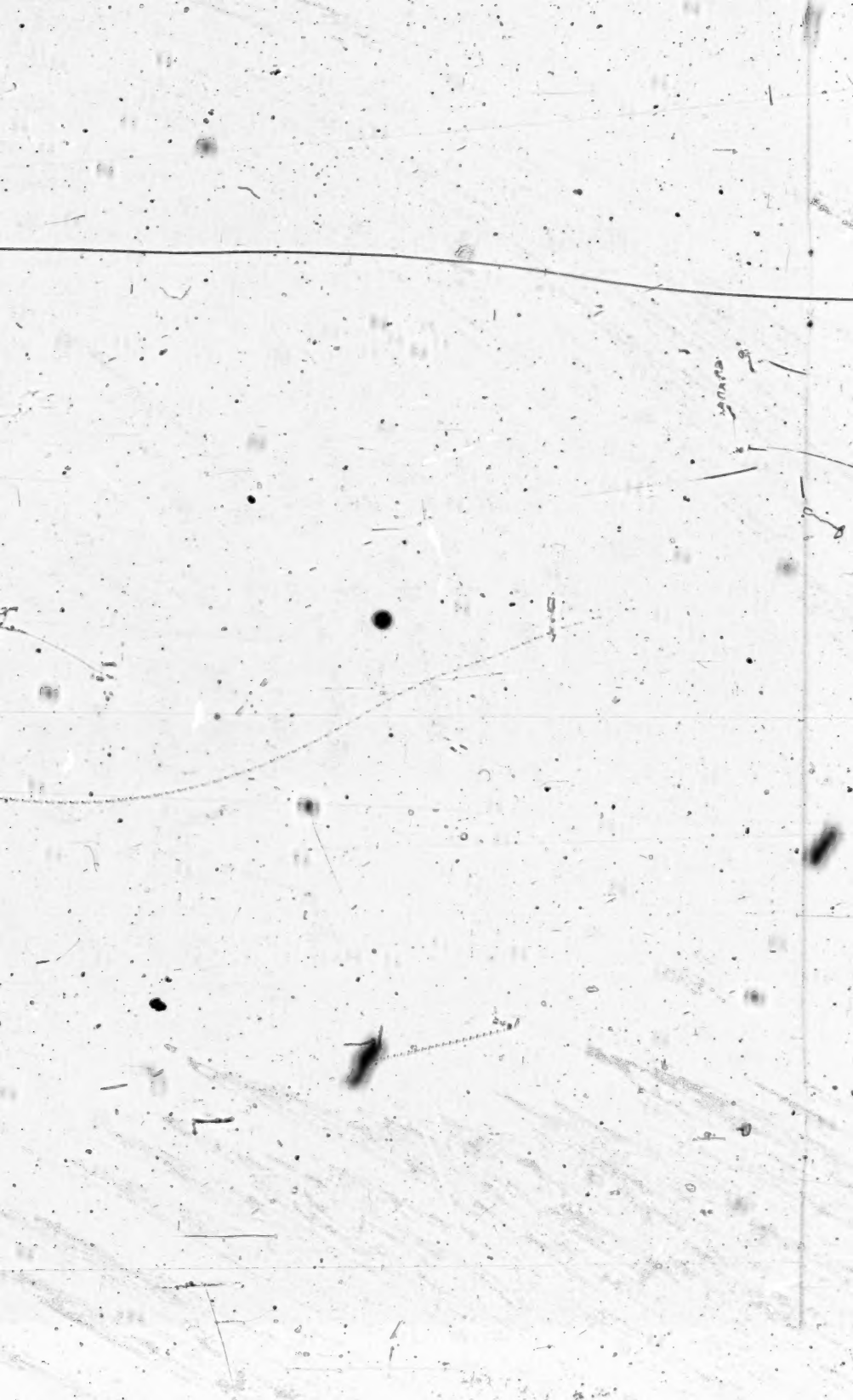

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BRIEF OF THE RESPONDENT

Question Presented

In a State case tried one year prior to the *Mapp* case but not decided by the Appellate Court until one year after *Mapp* and wherein evidence seized without a search warrant was admitted, but wherein evidence *aliunde* the illegally seized evidence was sufficient to warrant a finding of guilt, was the petitioner deprived of due process under the Fourteenth Amendment?

ARGUMENT

The State of Connecticut does not challenge the accuracy of the matters set forth in the first six pages of Petitioner's brief, except the question presented on page 3. As to all other matters within those pages, the State will not incorporate same in its brief.

The Record p. 1 discloses that the Petitioner felt that his defense was that the acts he committed did not fall within the provisions of the Statute, Section 53-45 of the Connecticut General Statutes, 1958 Revision, as amended by Public Act 437 (1959) entitled, "Injury to Public Buildings, Furniture Or Voting Booths," on the grounds that his acts did not constitute an injury to a public building.

No motion to suppress any evidence was filed and the only challenge offered was in the form of a Demurrer to the Information. R. pp. 1 and 2.

Upon his Demurrer being overruled, he went to trial and upon conviction filed a Motion in Arrest of Judgment and again advanced the argument that the offense charged in the Information does not constitute an injury to public property and, therefore, does not constitute a violation of the statute.

It is significant that no claim is advanced that any illegally seized evidence was introduced in violation of his constitutional rights. He based his defense solely upon a claimed deficiency in the Information as commented upon above.

Even in the Request for Finding, R. p. 10, filed October 1, 1960, the Petitioner made no request that the Court find that the illegally seized evidence was not admissible and should have been excluded, but only requested a finding that the Court erred in precluding the Petitioner from establishing that the police officers searched the premises without a warrant in violation of the Fifth Amendment.

It was not until the *Mapp* decision (June 1961) that the Petitioner switched to the grounds upon which he is now proceeding and using Mapp as his authority.

The State concedes, as it must, that at the time the can of paint and the paint brush was taken by the police officer from the automobile which was standing unoccupied in the garage beneath the Petitioner's residence that he had neither a search warrant nor an arrest warrant and that, therefore, under the *Mapp* case such evidence is now inadmissible even though at the time of the trial and conviction in June of 1960, it was admissible in a state trial because Connecticut had never adopted the exclusionary rule. It has never been denied that the Petitioner was stopped while operating his motor vehicle during the early morning hours of the day in question and within a very short distance of the location where the crime was committed. See R. pp. 11 and 12, especially paragraph 15 wherein it was specifically found that the Petitioner admitted, along with his associate, that they were the ones who had painted the swastikas on the synagogue.

Not only is the other evidence exclusive of the illegally admitted evidence damaging against the Petitioner—especially significant is the fact that he never seriously challenged the right of the State to introduce the evidence

in question but relied upon an entirely different ground for lack of jurisdiction as set forth in his Demurrer and his motion to set aside the judgment.

Therefore, as the Record shows and as the decision of the Supreme Court of Errors of the State of Connecticut states, after that court had made a thorough examination of the transcript of the evidence that there was ample evidence *aliunde* the illegally seized evidence of the can of paint and the paint brush to warrant a finding of guilty. See R. p. 22 wherein appears the following taken from Chief Justice Baldwin's unanimous opinion:

> "The defendants do not claim, nor, as the transcript shows, could they claim, that the illegal search and seizure induced their admissions or confessions. • • • In other words, their claim is that the state, in order to prove that a crime had been committed, had to rely solely on the admission in evidence of the paint jar and the brush. The answer to that claim is that there was ample evidence besides the defendants' confessions and the jar of paint and the brush to prove that swastikas had been painted on the synagogue between the hours of 4 and 5 o'clock on the morning of February 1, 1960. This was sufficient to establish that the crime charged had been committed by someone. The confessions were not inadmissible on the ground claimed, and no other ground of inadmissibility is advanced."

It is the claim of the State that the illegally seized evidence, if anything was cumulative in nature and not the primary evidence upon which the Court without a jury issued a finding of guilty.

This is not a case wherein the dwelling of a citizen, as such, was invaded. The automobile from which the can of paint and the brush was taken was standing in a garage located beneath the house and the garage and automobile were unoccupied at the time. There was no taking of articles from anyone's person and there was no violence nor abuse involved.

Conclusion

Therefore, as the Record shows and as the Finding of the Court and the decision of the Supreme Court of Errors of Connecticut substantiates, there was ample evidence, exclusive of the illegally seized evidence upon which to base a finding of guilty, and the State, therefore, respectfully requests that that finding of guilty be affirmed by this Honorable Court.

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